Civil Law and Litigation

LASC Issues 4-3 Opinion on Summary Judgment

Zapata v. Seal, 20-1148 (La. 9/30/21), ____ So.3d ____, 2021 WL 4472588.

In this motor-vehicle collision case, plaintiff, who had a preexisting back injury, requested damages for the cost of a subsequent back surgery, among other things. The doctor who performed plaintiff's surgery stated at deposition that he did not believe that the incident necessitated the operation. Citing the doctor's testimony, defendants moved for partial summary judgment as to the medical costs. Twelve days before the hearing on defendants' motion, plaintiff filed an opposition to summary judgment, attaching the affidavit of another doctor who *did* find a causal link between the incident and the surgery.

The trial court disregarded the newly filed affidavit and granted partial summary judgment in favor of defendants because plaintiff's opposition was not filed at least 15 days before the hearing date, per Louisiana Code of Civil Procedure article 966(B). Plaintiff moved to reconsider, or, in the alternative, for a new trial. The trial court denied that motion as procedurally improper as the partial summary judgment was an interlocutory judgment and not a final one. Plaintiff responded with a motion to vacate, once again including the doctor's signed affidavit. This time, the court could entertain the motion as it was appropriate for an interlocutory judgment. The court granted the motion and vacated its partial summary judgment, finding that the new doctor's affidavit created a genuine issue of material fact. Defendants took a writ, arguing that the trial court disregarded the time limitations of article 966(B) by accepting evidence that was previously available to plaintiff before the hearing on summary judgment and was not timely filed in opposition thereto. The writ ultimately made its way to the Louisiana Supreme Court.

The court reviewed the trial court's vacatur for abuse of discretion, ultimately arriving at a 4-3 split decision. The crux of the issue lay in the perceived (or not) tension between Louisiana Code of Civil Procedure articles 966(B) and 1915(B). Whereas article 966(B) provides a mandatory time requirement for opposition to summary judgment to be filed no less than 15 days before the motion hearing, article 1915(B) provides that partial judgments not adjudicatory of all claims at issue are not final judgments unless specifically so designated; and moreover, that such partial interlocutory judgments "may be revised at any time prior to the rendition of the judgment adjudicating all the claims and the rights and liabilities of all the parties."

Applying principles of codal interpretation, the majority, with Chief Justice Weimer concurring to add additional reasons, found that defendants' position incorrectly conflated article 966(B)'s time requirements specific to summary judgment with the rules for interlocutory and partial judgments given in article 1915(B). Based on a plain reading of article 1915(B), the court stated the partial summary judgment was indeed subject to revision at any time prior to either certification as a final judgment or rendition of a judgment conclusive to all parties and claims. Thus, the trial court correctly applied article 966(B) in denying plaintiff's motion to reconsider but also properly exercised its discretion in later vacating its judgment based on article 1915(B). The court found it unnecessary to add the "new evidence" standard of Louisiana Code of Civil Procedure article 1972(2) as a requirement for revision under article 1915(B) because parties seeking to avoid revision of interlocutory judgments already have the remedy available to them of certifying those judgments as final.

Justices Crichton and Genovese vigorously dissented, with Justice McCallum joining. The dissenters argued that article 966 and its time limitations are mandatory as opposed to article 1915's permissive review, are more recent expressions of the legislative will and are more specific. In effect, they argued, the majority's ruling allows for the motion to vacate to be used as a "back-door" circumvention of article 966's time limitations, thereby rendering summary judgment timelines indefinite.

—**Lawrence J. Centola III**
Member, LSBA Civil Law and Litigation Section
Martzell, Bickford & Centola
338 Lafayette St.
New Orleans, LA 70130
and
Ashton M. Robinson
Jefferson Parish District Attorney's Office
1546 Gretna Blvd.
Harvey, LA 70058

Corporate and Business Law

Louisiana Legislative Changes Impacting Corporate Taxes

Acts 134, 389 and 396, 2021 Leg. Reg. Sess.

On June 15, 2021, the Louisiana Legislature concluded its regular session with the enactment of various tax reform measures. These reforms included, among other things, substantial changes to corporate tax calculations under Louisiana law. The changes include (1) eliminating the current federal income tax deduction (the FIT deduction) for corporate income tax purposes, (2) modifying the corporate income tax rate, (3) reducing the Louisiana corporate franchise tax, and (4) repealing the lowest corporate franchise tax bracket. Importantly, however, while these changes were enacted through the Legislature earlier this year, these tax reforms are tied to voter approval of Louisiana constitutional amendments addressing the FIT deduction for income tax purposes and a constitutional cap on the individual income tax rate. Amendments to the Louisiana Constitution require voter approval in statewide elections. These amendments were up for a vote in the Nov. 13, 2021, election.

Act 134 is a proposed constitutional amendment that, if adopted, would amend Art. VII, Section 4 of the Louisiana Constitution to remove the availability of the FIT deduction from the Louisiana Constitution for Louisiana income tax purposes (making the availability of the FIT deduction subject to the vote of the Legislature, rather than a constitutional right, for all future tax years beginning in 2022). The current law in the Constitution requires the availability of a deduction of the full amount of federal income tax paid for all state income taxes. Act 134 would also amend the Constitution to place a constitutional cap on the state's individual income tax rate at a maximum of 4.75% beginning in 2022. The state's current top individual income tax rate is 6%.

Act 396, acting in conjunction with Act 134, statutorily eliminates the corporate FIT deduction and modifies the rate and bracket structure for calculating corporate income tax. The new corporate income tax rates would be 3.5% for the first $50,000 of Louisiana taxable income; 5.5% on Louisiana taxable income above $50,000 but not in excess of $150,000; and 7.5% on all Louisiana taxable income in excess of $150,000. This act further reduces the tax rate on taxable income of every S corporation that elects to be taxed at the corporate level. As part of the larger "tax reform package," this act is contingent on the enactment of Act 134 and corresponding constitutional amendment passage (discussed above), the enactment of Act 395 (which reduces the rates for calculating individual income tax), and the enactment of Act 389 (discussed below). Based on the Nov. 13 constitutional amendment outcome, these changes would be effective for tax periods beginning on and after Jan. 1, 2022.

Act 389 makes changes to the Louisiana corporate franchise tax. Currently, the franchise tax rate is tiered, with the first tier being $1.50 per $1,000 on the first $300,000 of taxable capital, and the second tier being $3 per $1,000 on taxable capital in excess of $300,000. As enacted, if the constitutional amendments are approved by the voters, beginning in the 2023 tax year, the first tier would be eliminated entirely and the second tier would be reduced to $2.75 per $1,000 for the taxable capital in excess of $300,000. Further, the enacted law provides for subsequent automatic franchise tax rate reductions through a procedure that reduces rates by the percent that actual corporate income and franchise tax collections have exceeded those of the 2019 fiscal year. This process would begin in April 2024, potentially affecting the 2025 fiscal-year collections. These franchise tax changes are subject to Louisiana voters' statewide election approval. The enacted law also separately extends for two years the suspension of the corporate franchise tax on small business corporations (to all franchise taxable periods beginning between July 1, 2020, and July 1, 2023). Previously, the suspension was available for franchise taxable periods between July 1, 2020, and June 30, 2021. A small-business corporation is an entity subject to the corporate franchise tax that has taxable capital or $1,000,000 or less. This two-year extension of the suspension of franchise tax for small business corporations was not tied to the constitutional amendment vote.

—**Rachel L. Solino**
Jones Walker, LLP
201 St. Charles Ave.
New Orleans, LA 70170
and
Matthew A. Mantle
Chair, LSBA Taxation Section
Jones Walker, LLP
201 St. Charles Ave.
New Orleans, LA 70170

Environmental Law

Subsequent Purchaser Doctrine Applies Regardless of Relationship of Parties to the Transfer

La. Wetlands, LLC v. Energen Resources Corp., 21-0290 (La. App. 1 Cir. 10/4/21), ____ So.3d ____, 2021 WL 4548529.

The Louisiana 1st Circuit applied the subsequent-purchaser doctrine to hold that a current landowner has no standing to bring a lawsuit for property damage that occurred prior to its acquisition absent a valid assignment of the right to sue, even when the current landowner is a family-owned company to whom the property had been transferred by individual family members who owned the property at the time the damage occurred.

In Louisiana, the subsequent-purchaser doctrine has been consistently applied since the Louisiana Supreme Court decision in *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, 10-2267 (La. 10/25/11), 79 So.3d 246, 256-57, where the court held that a property owner in Louisiana "has no right or actual interest in recovering from a third party for damage which was inflicted on the property before his purchase, in the absence of an assignment or subrogation of the rights belonging to the owner of the property when the damage was inflicted." This seminal case held that the right to recover for damage to the property is not transferred to a subsequent owner without a clear stipulation that the right has been transferred.

In *Louisiana Wetlands,* a 300-acre tract of land was owned by the Bailey family for over a century. Oil and gas exploration and production activities commenced in 1948 and continued until 2000. In 2009, nine years after the last well was plugged and abandoned on the property, members of the Bailey family formed New 90, LLC (New 90) to manage the land. In doing so, the family executed an act of transfer that transferred their undivided interests in the property to New 90 in exchange for membership interests in the LLC. Seven years later in 2016, New 90 and another plaintiff sued the oil and gas companies who performed exploration and production activities on the property between 1948 and 2000, seeking damages for contamination of the land allegedly caused by defendants' operations. The defendants sought to dismiss New 90, arguing that the subsequent-purchaser doctrine barred New 90's claim as the damage occurred before New 90 acquired the property and New 90 was never assigned the right to sue. The trial court agreed and dismissed New 90's claims.

On appeal, New 90 argued that the subsequent-purchaser doctrine did not apply in this case because the act of transfer was not an arm's-length "sale" of the property, but rather a transfer from family members to their closely held LLC in exchange for membership in that LLC. Citing the "comprehensive analysis" of the Louisiana Supreme Court decision in *Eagle Pipe*, the 1st Circuit disagreed with New 90 and found the subsequent-purchaser doctrine applicable because "it is immaterial how property is transferred to a particular successor." Therefore, the court reasoned, "[i]f the transferring instrument does not contain an explicit assignment of the personal right to sue for damages to the property, the right remains with the transferor." Applying this rule, the 1st Circuit found that because the act of transfer between the Bailey family and New 90 did not expressly or specifically assign the right to sue for property damages, New 90 had no standing to sue for property damages that occurred prior to its acquisition.

Ultimately, the recent decision in *Louisiana Wetlands* reaffirms that the subsequent-purchaser doctrine applies to all property transfers by particular title, regardless of the relationship of the parties to the transfer.

—John M. Parker
Liskow & Lewis, APLC
822 Harding St.
Lafayette, LA 70503
and
Court C. VanTassell
Member, LSBA Environmental Law Section
Liskow & Lewis, APLC
822 Harding St.
Lafayette, LA 70503

Family Law

Custody

Lasso v. Bonnecarrere, 21-0551 (La. App. 1 Cir. 8/16/21), 2021 WL 3616698.

The appellate court did not consider relator's writ application because relator did not provide a copy of the judgment complained of; a copy of each pleading on which the judgment was founded, including pending motions to modify custody and oppositions thereto; court minutes; and the notice of intent and return date order. The court stated that supplementation would not be considered. However, if relator sought to file a new application, it had to contain all necessary documentation, including proof that the original application was timely filed, and it had to be filed within the delays set by the appellate court and include a copy of the present appellate court ruling.

Fuller v. Fuller, 21-1223 (La. 9/27/21), ____ So.3d ____, 2021 WL 4405900.

Although the Louisiana Supreme Court denied writs in this matter, three of the justices would have granted writs, and Justice Crichton assigned reasons, opining that he would have granted the writ, reversed the court of appeal, and reinstated the trial court's modification of the visitation schedule because the trial court's determination should have been given great weight under the abuse-of-discretion standard. The trial court had awarded physical custody every other weekend during the school year and equal time during summer vacation and holidays, finding that equal custody was not feasible or in the best interest of the children. In reversing the trial court, the court of appeal had found that the physical custody schedule did not ensure "frequent and continuing contact." Justice Crichton emphasized that the trial court had heard testimony from numerous witnesses, including the children's psychologist, and was in the best position to weigh the credibility of the testimony presented.

Cook v. Sullivan, 20-1471 (La. 9/30/21), ____ So.3d ____, 2021 WL 4472559.

The Louisiana Supreme Court affirmed the court of appeal's reversal of the trial court judgment in this custody case regarding Ms. Sullivan, the biological parent, and Ms. Cook, Ms. Sullivan's former same-sex partner and a non-parent of the child. During their relationship, Ms. Sullivan gave birth to a child, whom the parties raised together until their separation. They never married, and Ms. Cook never adopted the child. Following their separation, they shared the child until Ms. Sullivan unilaterally terminated the arrangement, causing Ms. Cook to file a petition to establish parentage, custody and support. The trial court ruled that Ms. Cook was a "legal parent of the child" and that failure to reestablish her relationship with the child would result in substantial harm to the child. The court thus awarded the parties joint custody, with Ms. Sullivan as the domiciliary parent.

The trial court relied on the doctrine of psychological/de facto parent to find that Ms. Cook was a "legal parent" and did not employ Louisiana Civil Code article 133 in its analysis to treat her as a nonparent in a custodial suit with a parent. Rather, because the court found that she was a "legal parent," she was not obligated to meet article 133's requirement of showing substantial harm. The court of appeal reversed, finding that the concept of a "legal parent" did not exist in Louisiana but that this was a custody dispute between former same-sex partners and had to be decided under article 133. The court of appeal stated: "It is not the judiciary's role to fill in gaps left by the legislature." The court of appeal also found that the trial court failed to follow Louisiana law because Ms. Cook was not a biological parent and had never adopted the child, and, thus, could not be treated as a parent. It also found that there were no grounds in the record to find that awarding Ms. Sullivan sole custody would result in substantial harm to the child. The Louisiana Supreme Court reviewed the matter de novo because there were legal errors that interdicted the fact-finding process and found that article 133 applied. The Court determined that the record supported an award of sole custody to Ms. Sullivan; it affirmed the court of appeal and reversed the trial court.

Justice Griffin concurred to "emphasize the shortcomings of the existing statutory scheme in the wake of *Obergefell*" and concluded: "It is incumbent on the legislature to address these important policy issues of child custody and visitation rights involving same-sex relationships."

Property

Drayton v. Drayton, 54,034 (La. App. 2 Cir. 9/22/21), ____ So.3d ____, 2021 WL 4301563.

While serving in the U.S. Air Force and stationed in Germany, Mr. Drayton met and later married Ms. Drayton. They later relocated to Louisiana and subsequently divorced in Louisiana. At issue was his military-retirement pay. Because Mr. Drayton was originally a domiciliary of Mississippi and did not change his domicile while in Germany, that portion of his military-retirement pay earned prior to the parties' moving to Louisiana had to be determined under Mississippi law. Not until they moved to Louisiana did they establish a Louisiana domicile, and, at that point, the Louisiana community-property regime applied. The court of appeal remanded the matter for the trial court to partition that portion of the pension controlled by Mississippi law under Mississippi's law of equitable distribution. Because there was a prior judgment in which the parties stipulated that the termination date of the community was the date of the rendition of the judgment of divorce, rather than the date of the filing of the petition, the appellate court found that the date could not be changed to the "correct" termination date because neither party timely filed a motion for new trial or appealed the original judgment, and all delays to attack that judgment had lapsed.

Fairbanks Dev., LLC v. Johnson, 20-1031 (La. 9/30/21), ____ So.3d ____, 2021 WL 4472622.

Prior to their marriage, the parties purchased property that was titled in both of their names but paid for entirely by Ms. Petersen. The acts of acquisition did not state the parties' respective ownership percentages. Consequently, pursuant to Louisiana Civil Code article 797, their ownership shares are presumed to be equal. The trial court found that the property belonged solely to Ms. Petersen because she paid the entire purchase price. The court of appeal reversed, finding that Mr. Johnson owned an undivided one-half interest in the property. The Supreme Court granted her writ application and affirmed the court of appeal. Because the act of sale was an authentic act, it constituted full proof of the parties' agreement, and because she did not allege any error, fraud or duress, she could not challenge its terms. The Court noted that if she did not intend to be an equal co-owner with him, she could have put the property in her own name, stated the percentages that each would own or executed a counter letter. Otherwise, the acts reflected an equal co-ownership, despite her later change of mind once their relationship terminated. There were two concurrences and three dissents. The first concurrence distinguished the Louisiana civil law concept of "cause" and the common law concept of "consideration." One dissent argued that they may have been co-owners, but that co-ownership was in the proportion of 0/100. The other dissent argued that the presumption under article 797 was a rebuttable presumption, and if the authentic act could not be challenged, then the presumption could never be rebutted when both parties' names were on the act of acquisition with no designation of ownership percentages.

—David M. Prados
Member, LSBA Family Law Section
Lowe, Stein, Hoffman, Allweiss & Hauver, LLP
Ste. 3600, 701 Poydras St.
New Orleans, LA 70139-7735

Fidelity, Surety and Construction Law

Integration Clause Prevented Claim for Fees Due on Prior Contract

Mark Doyle Constr., LLC v. DVR LA2, LLC, 53,957 (La. App. 2 Cir. 6/30/21), 324 So.3d 226.

DVR Shreveport, LLC, and DVR LA2, LLC (collectively referred to as DVR) and Mark Doyle Construction, LLC (Doyle) entered into a contract providing that, in two phases, Doyle would construct parking area improvements on 115 acres of land on an automobile plant. Upon the closing of the contractual term in July 2017, Doyle submitted an invoice for final payment for 45 acres of improvements, DVR wired payments for the full amount of the invoice to Doyle and Doyle accepted the payment. However, Doyle claimed outstanding amounts were still due.

In December 2017, the parties agreed to a second contract that contained an integration clause providing that "this contract 'represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral.'" *Id.* at 228. The contract did not refer to an agreement to pay for work already performed by Doyle or a promise of future work. DVR paid Doyle the full amount for the work completed under the second contract.

In February 2018, Doyle sought payment for work allegedly completed before accepting the "final payment" from DVR in July 2017. DVR denied that any amount was owed and declined to pay. Doyle filed a statement of claim and privilege to preserve its claims against DVR, along with a petition alleging DVR's failure to pay for the disputed invoice and failure to provide Doyle with the opportunity for future work.

On appeal, Doyle argued that the integration clause did not supersede the first contract and prior oral agreements because they were separate and unique from the December 2017 contract. The court rejected this argument, stating "[a] n integration clause, also known as a merger clause, is a contractual provision stating that the contract represents the parties' complete and final agreement . . . . An integration clause precludes any prior or contemporaneous agreements which are not set forth in the contract." *Id.* at 230, *citing Wall v. Bryan*, 52,165 (La. App. 2 Cir. 6/27/18), 251 So.3d 650, *writs denied*, 18-1270, 18-1280 (La. 11/5/18), 255 So.3d 1047, 1051. The court held that because the language of the integration clause explicitly set forth the parties' intent, Doyle waived its claims for amounts earned prior to the execution of the second contract. It therefore affirmed summary judgment in favor of DVR and the dismissal of Doyle's claims.

—Douglass F. Wynne, Jr.
Member, LSBA Fidelity, Surety & Construction Law Section
Simon, Peragine, Smith & Redfearn, LLP
1100 Poydras St., 30th Flr.
New Orleans, LA 70163

Labor and Employment Law

COVID Conflicts: Federal Courts Disagree on Religious Exemptions to Vaccine Mandates

Within 24 hours of each other, two federal judges reached seemingly opposite holdings on two statewide COVID-19 vaccine mandates for health-care workers that excluded the opportunity for employees to seek an accommodation for a sincerely held religious belief. These rulings — considered alongside Texas' recent efforts to pass a statewide ban on vaccine mandates and the federal government's efforts to institute a nationwide vaccine mandate for employers of certain sizes — demonstrate that this dispute will require Supreme Court intervention on the constitutional contours of these issues.

On Oct. 12, 2021, the U.S. District Court for the Northern District of New York addressed a preliminary-injunction claim brought by multiple unnamed health-care workers who sought to enjoin New York's regulation mandating that most health-care workers be vaccinated against COVID-19. *A. v. Hochul*, No. 1:21-CV-1009, ____ F.Supp.3d ____, 2021 WL 4734404, at *1 (N.D.N.Y. Oct. 12, 2021). The Department of Health adopted this emergency regulation on Aug. 26, 2021, which eliminated a religious exemption that was included in previous iterations of the regulation. The plaintiff health-care workers brought suit claiming that the regulation violated their constitutional rights under the Free Exercise Clause, the Supremacy Clause and the Equal Protection Clause. The plaintiffs alleged that they have a sincerely held religious belief against receiving any of the COVID-19 vaccines because the development of these vaccines employed fetal cell lines derived from procured abortions.

The federal court agreed with the plaintiffs. First, the court held that plaintiffs would likely win on the merits of their claim under the Supremacy Clause because the recent amendment to the New York regulation removing the religious exemption provision did "not make room for 'covered entities' to consider requests for reasonable religious accommodations," creating a conflict with Title VII's religious protections. *Id.* at *6. New York argued that the removal of the religious exemption provision brought the COVID-19 regulation in line with other state immunization regulations, such as for measles and rubella, but the court swiftly rejected this argument because the plaintiffs were not challenging other vaccination regulations.

The court also held that the plaintiffs would likely win on the merits of their First Amendment and Free Exercise Clause claims. The court found that the regulation was not neutral, and instead was specifically directed at a religious practice because of the intentional removal of the religious exemption provision from the final version of the regulation. Thus, the regulation is subject to strict scrutiny, which the regulation fails to satisfy, according to the court. Although New York could plainly establish the first element of strict scrutiny, that the law advances interests of the highest order, the court held that the law is not narrowly tailored to achieve those interests. The court held that less intrusive means were available, namely daily testing and mask mandates, that could impose lesser burdens on religious liberty. Thus, the court granted the preliminary injunction. In its concluding remarks, the court signaled that this decision is ripe for immediate appeal due to the exceptional importance of its decision to the health and religious freedoms of New York citizens.

Just one day later and two states over, the District Court of Maine issued almost exactly the opposite ruling on Oct. 13, 2021. *Doe v. Mills*, No. 1:21-CV-00242-JDL, ____ F.Supp.3d ____, 2021 WL 4783626 (D. Me. Oct. 13, 2021). On Aug. 12, 2021, Maine's Department of Health made effective its regulation requiring that certain health-care employees be fully vaccinated against COVID-19 by Oct. 29, 2021. Multiple health-care workers sued Maine over the regulation, arguing that it violated their sincerely held religious beliefs because there was no religious exemption provision. As in the New York case, the plaintiffs alleged that the absence of a religious exemption provision constituted a violation of the Free Exercise Clause, the Equal Protection Clause and the Supremacy Clause.

The court held that, unlike the New York regulation, the Maine regulation was a neutral one even though it also excluded a religious exemption, and thus was subject to the rational basis test. The Maine court specifically addressed the historical differences between the New York regulation and the Maine regulation. Unlike the New York regulation, which had its religious exemption removed days prior to its effective date, the Maine regulation never had a religious exemption because of Maine's 2019 legislation removing all religious exemptions from vaccine mandates.

Further, the court differentiated the regulation from the Supreme Court's decision in *Tandon v. Newsom,* 141 S.Ct. 1294 (2021), that held that laws prohibiting religious gatherings violated the Free Exercise Clause. The court in *Mills* held that the plaintiffs *could* exercise their religious rights by refusing to take the vaccine, while the prohibition in *Tandon* directly prevented the exercise of religious rights. As such, the court held that, despite the risk to their employment, the regulation did not hinder the religious rights of plaintiffs and satisfied the rational review test.

The court went on to hold that, even under strict scrutiny, the regulation's exclusion of a religious exemption was valid. As compared to the New York court, which listed mask mandates and daily testing as less restrictive alternatives that address COVID-19 while also protecting religious rights, the Maine court disagreed. It held that daily testing is not a proper alternative because test results cannot keep up with the transmission speed of the Delta Variant due to the low supply of tests, understaffed facilities and the time for the test results to become available. The Maine court also rejected the use of masks as an alternative to vaccination because COVID-19 has still spread among the state's health-care workers despite ongoing mask mandates.

The Maine court then went on to reject the plaintiffs' Title VII claim because they failed to exhaust their administrative remedies and because the loss of employment does not satisfy the irreparable injury element for a preliminary injunction. Because the Free Exercise Clause was not violated, the court held that the Equal Protection Clause and conspiracy to violate their civil rights were not violated, either. Finally, the court rejected the plaintiffs' Supremacy Clause claim because the Supremacy Clause does not provide a private right of action.

These two cases paint very different pictures of how courts are handling COVID-19 vaccine mandates. As more states continue to pass mandates and OSHA finalizes its regulation on COVID-19 vaccinations, these two cases are likely early examples of the split in the way courts will address religious exemptions to COVID-19 vaccination mandates. Employers will likely see an unprecedented number of religious accommodation requests due to vaccine mandates. Employers should carefully watch how these cases, and the other religious accommodation cases that will certainly develop, proceed through the courts to best determine how to balance the religious rights of their employees and employee safety. Until more clarity develops in the courts, employers should continue to be cautious of refusing to consider or denying the religious accommodation requests of their employees.

—Philip J. Giorlando
Secretary-Treasurer, LSBA Labor and Employment Law Section
Breazeale, Sachse & Wilson, LLP
Ste. 1500, 909 Poydras St.
New Orleans, LA 70112

Mineral Law

Court Holds La. R.S. 30:10(A)(3) Applies to Non-Operator Lessees in Force-Pooled Unit

Dow Constr., LLC v. BPX Operating Co., No. CV 20-9, 2021 WL 4492863 (W.D. La. Sept. 30, 2021).

In this case, the parties disputed whether an operator may properly charge post-production costs to non-operators when the non-operators do not make their own marketing arrangements and the operator sells the share of production attributable to the non-operators. The plaintiff, a non-operator, relied on La. R.S. 30:10(A)(3) in arguing that the operator may not. The court has not yet decided the ultimate issue, but the court rejected the operator's contention that section 30:10(A)(3) does not even apply to non-operator lessees.

Louisiana law allows the commissioner of conservation to create pooled drilling units, to name an operator of the unit and to require the owners of mineral interests to share proportionally in unit production or proceeds from unit production. Section 30:10(A)(3) states:

> If there is included in any unit created by the commissioner of conservation one or more unleased interests for which the party or parties entitled to market production therefrom have not made arrangements to separately dispose of the share of such production attributable to such tract, and the unit operator proceeds with the sale of unit production, then the unit operator shall pay to such party or parties such tract's pro rata share of the proceeds of the sale of production within one hundred eighty days of such sale.

The plaintiff argued that the operator's obligation to pay "the pro rata share of the proceeds of the sale of production" precludes the deduction of post-production costs. Without conceding that interpretation, the defendant argued that section 30:10(A)(3) does not apply to non-operator lessees because "unleased interests" refers to owners of mineral interests not subject to any lease whatsoever. The defendant thus asserted that section 30:10(A)(3) does not authorize the operator of a pooled unit to sell the share of production attributable to non-operator lessees. The defendant acknowledged that it had been selling the plaintiff non-operator lessee's share of production, but it stated that it had been doing so under an implied authorization, not pursuant to section 30:10(A)(3).

The defendant filed a partial motion to dismiss, based on its argument that section 30:10(A)(3) is inapplicable "because it only applies to interest owners who have no lease at all," while the plaintiff counter-argued section 30:10(A)(3) encompasses all mineral interests that are "unleased as to the operator of the well."

The court stated that Title 30 sometimes uses "unleased interests" to refer to mineral interests not subject to any mineral lease whatsoever, while other times

Title 30 uses the term to refer to mineral interests not under lease to the operator of a force-pooled unit. Therefore, the term "unleased interests" in section 30:10 must be read in context of that statute.

The court noted that, when "unleased interests" is used in an earlier part of section 30:10, it is followed by the qualifier "not subject to an oil, gas, and mineral lease," but this qualifier does not appear after "unleased interests" in section 30:10(A)(3). Instead, section 30:10(A)(3) applies to "unleased interests for which the party or parties entitled to market production therefrom have not made arrangements . . ." and, in the industry, mineral lessees typically have the right to market production (which is impliedly passed to the operator in this forced-pooling situation). "If the Legislature intended to limit this provision . . . to the completely unleased interest, [this] phrase would be unnecessary and superfluous because the landowner of the completely unleased interest would always be the 'party or parties entitled to market production.'" The court also recognized that section 30:10(A)(3) is directed to the *operator's* obligations, and thus it makes sense that the Legislature would use "unleased interests" to mean those interests unleased by the operator.

Holding otherwise would, according to the court, create an incomplete statutory scheme given the purpose of section 30:10 to create a "comprehensive quasi-contract between mineral interest owners and the operator when they have not otherwise contracted with each other . . ." so that the mineral interest owner "receive[s] his just and equitable share of the oil and gas in the pool without unnecessary expense." Thus, excluding mineral lessees that have no lease with the operator would create a lacuna or "hole in the law." The court "decline[d] to adopt a reading of the statute that assumes the Legislature failed to consider a scenario when a reasonable reading of the statute would fill the gap."

The court rejected the 3rd Circuit's reasoning in *King v. Strohe*, 95-0656 (La. App. 3 Cir. 5/8/96), 673 So.2d 1329, as factually distinguishable and "based on the outdated and erroneous presumption that lessees only take their share of the production in kind, except when an order of the Commissioner authorizes cash payments to cure production imbalances." According to the court, *King* did not address this situation, where "an operator proceed[s] with the sale of unit production without giving lessees their share of production in kind." Nor are there any imbalances given "BPX markets and sells Dow's share of production" in exchange for cash payments to Dow. Making an *Erie* guess, the court found it would be absurd to allow "an operator to operate under section 10(A)(3) [by selling interests] without subjecting the operator to the statute."

—**Keith B. Hall**
Member, LSBA Mineral Law Section
Director, Mineral Law Institute
LSU Law Center
1 E. Campus Dr.
Baton Rouge, LA 70803-1000
and
Lauren Brink Adams
Member, LSBA Mineral Law Section
Baker, Donelson, Bearman,
Caldwell & Berkowitz, PC
Ste. 3600, 201 St. Charles Ave.
New Orleans, LA 70170-3600

Professional Liability

Bond for Costs

Bergeron v. Richardson, 20-1409 (La. 6/30/21), 320 So.3d 1109.

Following the conclusion of panel proceedings, during which the patient died, Mrs. Bergeron filed wrongful death and survival actions. Approximately six years later, the defendants filed a motion for bond for cost pursuant to La. R.S. 13:4522. The plaintiff responded that the motion was untimely, that the defendants' claim pertained to expenses rather than taxable costs and that the statute was unconstitutional. The trial court ruled that the motion was untimely and denied the bond request, noting that the denial rendered moot the constitutional challenge.

The appellate court reversed, relying principally on the 1927 *Whitson* case and the 1938 *Jones* case to decide that the filing of a demand for a cost bond could be made "whenever the necessity might arise," and it remanded the matter to the trial court to determine whether a bond was necessary. *Bergeron*, 320 So.3d at 1111.

Section 13:4522 provides, in pertinent part: "The defendant before pleading in all cases may by motion demand and require the plaintiff or intervenor to give security for the cost in such case," and the failure to timely give security would result in dismissal without prejudice. The plaintiff argued to the Supreme Court that the statute clearly requires the demand for costs to occur before pleadings are filed. (Louisiana Code of Civil Procedure article 852 defines pleadings as "petitions, exceptions, written motions, and answers.") The defendants countered that there is no time restraint on when such a bond can be demanded because "the defendant cannot require the plaintiff to give a bond for the payment of such costs as the defendant is concerned in until the necessity therefore arises." *Bergeron*, 320 So.3d at 1111.

The Court distinguished *Whitson* and *Jones*, on which the court of appeal relied, noting factual differences in those cases, and observing that in neither case was the plaintiff ordered to post bond. Ultimately, the Court decided it could not ignore the plain language of R.S. 13:4522 that a demand for security must be filed "before pleading."

The Court agreed that a defendant is unlikely to incur significant litigation costs before filing an answer; yet its obligation is "[t]o give meaning to every word in the statute" to avoid rendering "superfluous" the words "before pleading." *Id.* at 1113.

Joinder

Farooqui v. BRFHH Shreveport, LLC, 53,816 (La. App. 2 Cir. 4/14/21), 316 So.3d 579, *writ denied*, 21-0654 (La. 9/27/21), 324 So.3d 100.

The plaintiffs filed a lawsuit against two physicians, a hospital and the state. A medical-review panel found no fault by the named defendants but did find a breach by an unidentified person. The physicians and the hospital were dismissed with prejudice, leaving only the State as a defendant.

During the deposition of one of the panelists, the identity of the unknown parties who the panel found had breached the standard of care was discovered. The plaintiffs then amended the petition and alleged the negligence of the recently discovered physicians but did not include them as named defendants. Thus, the State remained the only named defendant in the lawsuit, with the plaintiffs alleging that the State was the employer of those physicians and was thus vicariously liable for their negligence.

The State filed exceptions, including one for nonjoinder, in which it contended that the employer of the doctors (LSU-Shreveport) was a required party, as any judgment without that party would be an absolute nullity. The plaintiffs argued there was no evidence that LSU-Shreveport was the doctors' employer "after the state had already judicially admitted they were employed by the state." *Id.* at 582. The State countered that the plaintiffs could not recover against it unless they named a healthcare facility as a defendant. The trial court granted the exception of nonjoinder.

The appellate court reviewed the management structure of LSU-Shreveport, which is "part of the LSU system and under the supervision and management of the LSU Board of Supervisors . . . '[which] shall have authority to exercise all power to direct, control, supervise, and manage the Louisiana State University Hospital at Shreveport[.]'" *Id.* at 582-83. Neither the LSU Board of Supervisors nor LSU-Shreveport would bear the responsibility for paying a medical-malpractice judgment, which remained the obligation of the State under La. R.S. 40:1237.1(G). Therefore, irrespective of who was not named as a party defendant, the case involves alleged medical malpractice by state employees. Noting that the Office of Risk Management is mandated to manage malpractice claims whether or not a facility is named and that the State admitted it was the employer of the physicians, the appellate court found, not only did there remain "an entity against whom a judgment could be rendered," but the State is the only party responsible for payment of a judgment against a state employee. *Id.* at 585. Holding the trial court abused its discretion in granting the exception of nonjoinder, the appellate court reversed the judgment in that regard.

—Robert J. David
Gainsburgh, Benjamin, David,
Meunier & Warshauer, L.L.C.
Ste. 2800, 1100 Poydras St.
New Orleans, LA 70163-2800

Taxation

Trucks and Trailers for Transportation Do Not Fall Under MM&E Exclusion

CORA-TEXAS Mfg. Co. v. Robinson, 20-0972 (La. App. 1 Cir. 4/16/21), 323 So.3d 886, *writ denied*, 21-0684 (La. 9/27/21), 324 So.3d 103.

CORA-TEXAS Mfg. Co. sought refunds for sales-and-use taxes paid on its purchases and leases of equipment CORA claimed were excluded from the definition of "sale at retail" pursuant to the manufacturing machinery and equipment (MM&E) exclusion.

CORA manufacturers sugar from sugarcane at its sugar mill in Iberville Parish. CORA acquires raw sugarcane from farmers. The farmers are not CORA's employees. Combines are used to harvest the sugarcane. The combines feed the stalks into machinery that chop the stalks into small billets. CORA does not own, lease or operate the combines or machinery.

The essential component of sugarcane for manufacturing raw sugar is sucrose. As cuts are made in the sugarcane, there is exposure to bacteria. Bacteria will convert sucrose to dextran. The formation of dextran means there is less sucrose, which lowers the production of raw sugar.

When sugarcane reaches the sugar mill, CORA extracts the sucrose and removes the bacteria. CORA's success is dependent on transporting the billets to the sugar mill as quickly as possible. Trucks and trailers are used for such transport. Farmers collect cane billets and deliver them to CORA's leased trucks and trailers. The trucks and trailers bring the billets to the sugar mill.

The main issue presented for review was whether trucks, trailers and other transportation equipment used by CORA in its business are MM&E under the MM&E exclusion. The majority of the refund claims at issue related to the trucks and trailers.

CORA claimed that the MM&E exclusion applied to lease payments, repairs and parts for cane trucks and trailers. The court affirmed the holding of the Louisiana Board of Tax Appeals (BTA) that the MM&E exclusion does not include property used to transport raw materials prior to the beginning of the manufacturing process. The court held the trucks and trailers are used by CORA for the transport and/or storage of the sugarcane and play no part as machinery that changes the form of the sugarcane. Other than natural processes to the sugarcane that CORA cannot alter, no physical changes are made to the sugarcane when they are being transported and stored in the trailers. The court held the trucks and trailers clearly do not fall under the MM&E exclusion and the BTA correctly found that the vehicles themselves, as well as any parts used in their maintenance and repair, were taxable.

In addition, the court affirmed the BTA's disallowance of the MM&E exclusion for nuts, screws, gaskets, seals and grease; a new roof constructed to encase an exposed portion of a conveyor belt; and front-end loaders, excavators, dozers and cranes.

—**Antonio Charles Ferachi**
Member, LSBA Taxation Section
Director of Litigation-General Counsel
Louisiana Department of Revenue
617 North Third St.
Baton Rouge, LA 70821

Tax Liability Issue

Ray v. Comm'r, No. 20-60004, 13 F.4th 467 (5 Cir. 2021).

In October 2021, the U.S. 5th Circuit Court of Appeals handed down a decision in *Ray v. Comm'r*, holding that a taxpayer's reliance on a previously stipulated decision with the Internal Revenue Service provided him with reasonable cause and a good-faith defense to the imposition of a subsequent penalty for the taxpayer's substantial understatement of his tax liability.

In *Ray*, the IRS disallowed the taxpayer's Internal Revenue Code section 162 deduction for legal expenses incurred. Those expenses stemmed from litigation the taxpayer brought against his ex-wife over her management of a hedge fund he previously invested in. The taxpayer timely disputed the disallowance, citing a previously stipulated decision entered into with the IRS, which allowed a section 162 business deduction for losses associated with that same hedge fund. The U.S. Tax Court determined that the percentage of the taxpayer's overall legal expenses linked to the trading losses were a deductible expense under Internal Revenue Code section 212, not section 162 — a determination that increased his tax liability. In addition, the Tax Court imposed a 20-percent, accuracy-related penalty under Internal Revenue Code section 6662 for the taxpayer's underpayment of his tax liability.

The 5th Circuit affirmed the Tax Court's decision in terms of the characterization of the deduction and agreed that the taxpayer's involvement with the hedge fund lacked the requisite continuity and regularity required for expenses to be considered part of a trade or business under section 162. The court did, however, overturn the Tax Court's ruling that the accuracy-related penalty could be imposed.

The court noted that section 6662 provides for the waiver of penalties when there is reasonable cause for the underpayment and the taxpayer has acted in good faith. Here, since the stipulated decision allowed a section 162 deduction for losses associated with the hedge fund, the 5th Circuit found that it was reasonable for the taxpayer to have relied on that same stipulated decision when claiming a section 162 deduction for legal expenses associated with the hedge fund. Judge Dennis dissented, reasoning that a determination of what constitutes "good faith" is a factual issue best left to the Tax Court's discretion.

—**Gianluca S. Cocito-Monoc**
3L, Tulane Law School
Senior Managing Editor,
Tulane Law Review
Under the Supervision of
Jaye A. Calhoun,
Member, LSBA Taxation Section
Kean Miller, LLP
Ste. 3600, 909 Poydras St.
New Orleans, LA 70112